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THE MEECH LAKE ACCORD AND THE THEORY OF FEDERALISM

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Of the many nations in the world that profess some adherence to the precept of federalism, Canadians, it would appear, are somewhat obsessed with it. Perhaps it is merely one's proximity to the debates that seem to continually rage between 'Ottawa' and 'the provinces' that makes one feel that such an obsession exists in this country, but surely there are few peoples in the world for which the idea of a federal state is so inherently tied to their national character. As one University of Alberta political scientist wrote:

> **...it appears that Canadians are completely unable to imagine their country as being other than federal...If pressed to consider alternatives, they invariably assume that this must mean the dissolution of the federal tie and independence for each of the ten provinces.** (Stevenson, pp. 1-2)

There would also appear to be more than a little historical justification for Canada's preoccupation with its federal status, for as Pierre Trudeau pointed out Canada has the eigth oldest written constitution, the second oldest of a federal nature and the oldest one combining federalism and responsible government. (Trudeau, p. 131) In recent years amendments to Canada's constitution have had and will continue to have very profound effects on the way federalism operates in this country. The adoption of the Charter of Rights and the expansion of judicial review that goes along with such a document has served to create a new locus of power in the Supreme Court, a development Canadian federalism is still trying to assimilate. Because the constitutional amendments made in 1982 were seen by many to be incomplete in many respects, a a new round of negotiations were begun under the leadership

of Prime Minister Brian Mulroney and eventually another agreement was signed to further amend both the 1867 and 1982 Constitution Acts. While still under consideration by the provincial legislatures and Parliament, the so-called "Meech Lake Accord"* is most likely to become part of Canada's supreme law in the near future.

The intent of this paper then is to place the recent agreement within the context of federalism, both on theoretical and political grounds. An attempt will be made to show that the Meech Lake Accord, in many of its provisions, violates the principles of federalism and will lead to some degree of political disaster. The solutions offered Canada's political and constitutional ills (and on the existence of some very serious problems within the Canadian federation there can be little doubt) are based on a desire to seek temporary and make-shift answers to problems that must clearly be tackled only after long consideration of all alternatives and the impact of each. The provisions of the Meech Lake Accord show an incredible lack of understanding of the basic tenets of federalism and of the purpose of a constitution. A nation's constitution is its ultimate legal document and should serve to define in broad terms that nation's character and the political principles to which it subscribes. In a western liberal-democracy a constitution should be structured so as to allow competing viewpoints as to the direction of the

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*This term refers to the agreement signed on June 3, 1987 and not to the original agreement actually signed at Meech Lake, the former being an amended version which will be put before the legislatures and Parliament.

country to be debated and implemented without resorting to major constitutional amendment. Indeed constitutional amendments should be viewed only as a last resort - a step to be taken should all other political avenues prove blocked.

In placing Canada's latest constitutional package in the context of the theory of federalism, the term itself must first be defined. Classic formulations of what constitutes a federal system have a tendency to be either too rigid or too vague to really act as a guide for serious discussion. For example K.C. Wheare's formal designation of federal government would in fact mean that Canada would not be considered a federal state. The rigidity of his original definition and the reality of Canadian politics forced Wheare to admit that in fact Canada operated as a federal state, though with some curious anomolies. (Wheare, 4th ed., 1964) The most significant of Canada's departures from the classic federal model are, of course, the federal powers of reservation and disallowance and the federal spending power. The latter is especially important in light of the new agreement.

For the purposes of this discussion, perhaps the most satisfying definition of federalism comes from Garth Stevenson's Unfulfilled Union. In seeking a definition that is not "unduly restrictive", that distinguishes federal states from unitary states and other forms of association, and emphasizes "the political aspects of federalism" Stevenson arrives at the following definition:

It is a political system in which most

> or all of the structural elements of the state (executive, legislative, bureaucratic judiciary, army or police and machinery of levelling taxation) are duplicated at two levels, with both sets of structures exercising effective control over the same territory and population. Furthermore, neither set of structures (or level of government) should be able to abolish the other's jurisdiciton over their territory or population. (Stevenson, p. 8)

Stevenson concludes the definition by adding that conflicts between the two co-ordinate levels of government are to be resolved through negotiation, as neither government is completely sovereign and cannot dictate to the other. Because the division of legislative powers can never be so finely drawn as to preclude debates over jurisdiction on certain issues, it stands to reason that federal nations will oscillate between periods of federal and provincial dominance depending on the prevailing political, economic and judicial outlooks. While not wanting to elaborate on the history of such swings of power in this country, suffice it to say that Canada finds itself variously at the mercy of either centripetal or centrifugal political forces.*

Federalism then is, in a certain sense, an evolutionary creature; changing and adapting to meet the challenges with which its presented. At the same time, federalism can not be said to have a telos; there is no end result toward which it tends. Thus, federalism can be seen to be as much a process as a concept.

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*A more complete discussion of these changes in the nature of Canadian federalism can be found in E.R. Black's Divided Loyalties; Concepts of Canadian Federalism (McGill-Queens, 1975).

If the swings between federal and provincial dominance are to be seen as natural adjustments set in motion by the political circumstances in which Canada finds itself, then the conclusion must be reached that Canada's constitution must be such that it allows such adaptation. A constitution then must not be so rigid as to define a nation in such a way as to bind future generations to a conception of the country they may not share. As will be shown, the Meech Lake Accord will do just that - the natural ebb and flow of federalism will be lost.

The terms of the Accord are relatively easy to spell out.* Needless to say, the most important constitutional issue prior to the Accord was drawing Quebec 'back into Confederation', even though their refusal to sign the 1982 constitutional agreement in no way effected that agreement's legality or even its applicability to Quebec. Indeed the issue was more one of political appearance and propriety than of any real or impending legal/constitutional crisis. The Accord's most important achievement was its amendment of the 1982 agreement, along with various other changes, that made that previous package more acceptable to Quebec.

The Constitution Act, 1867 is to be amended by placing within it an interpretational section instructing future politicians and especially future jurists to interpret the constitution in a manner consistent with the fact that:

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*The text of the Accord used here is that printed in the Globe and Mail (Nat. Ed.) on June 4, 1987.

> **...the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and;**
>
> **(b) The recognition that Quebec constitutes within Canada a distinct society;**

Further, the provincial legislatures and Parliament are given the responsibility to "preserve" the fundamental characteristic (i.e. Canada's inherent duality) referred to above, while the government of Quebec is given the right to "preserve and protect the distinct identity of Quebec".

To many, these sections merely constitute the recognition of the political realities in Canada. As Alberta Premier Don Getty has emphasized it is readily apparent to one who visits Quebec that indeed "there is a difference in Quebec". (Alberta Hansard, June 17, 1987) The question that should be raised is not whether Quebec is different or not, but rather whether any other conception of Quebec's relationship to the rest of Canada is now able to be put forward. While hardly universally endorsed, Pierre Trudeau's conception of one Canada "bilingual and multicultural" is a now a thing of the past. What the Meech Lake Accord does is entrench a rigid vision of the country without enough consideration of exactly what the end result will be; for Trudeau the Accord means "two Canadas, each defined in terms of its language". (Globe and Mail, May 28, 1987)

Regardless of what one thinks about the policy of bilingualism put forward by Trudeau, it must be seen that

at least the policy was first implemented as a matter of public policy (i.e. The Official Languages Act) rather than leaping in with a constitutional amendment. None of this is to say that Trudeau is necessarily correct about what the relationship between Quebec and the rest of Canada (or, more correctly, between French and English Canadians) should be. What is apparent is that Trudeau may be right in the fear that there is now only one legitimate way to view Canada. The elasticity that is inherent and necessary in federal-provincial relations has been removed and only through further constitutional amendment can it be altered. While it may be true that the majority of Quebeckers believe themselves to be distinct, little thought has been given about the impact of these sections. As columnist Jeffrey Simpson commented, Canada has no idea of exactly what the relationship will be between these new sections and the Charter of Rights (i.e. corporate rights vs. individual rights), nor is it clear exactly what powers are inherent in the right to preserve and protect Quebec distinctiveness. (Globe and Mail, May 7, 1987) The only thing that is clear is that Canada has leapt without looking - we can only hope that we are heading in the right direction.

It can not be stressed too strongly that constitutions are delicate creatures, meant to embody universally accepted ideals and goals. Constitutions are meant to be changed rarely and only after lengthy consideration; attempts to reform them should be based on a greater degree of consensus than is necessary for the implementation of public policy. When

everything becomes constitutional in nature, when political debates are all constitutional debates, then the constitution has lost its status as a nation's supreme law.

It is not just the fact that the constitution is being used to reflect specific political visions that should be worrisome to Canadians. The sections of the Meech Lake Accord dealing with the appointment of Supreme Court Justices and Senators are indeed violations of the basic principles of federalism. The demand for these changes by the provincial premiers also illustrates the hypocrisy and short-sightedness of their vision of Canada when it comes to constitutional change.

The Constitution Act, 1867 is amended as follows:

> 25. (1) Where a vacancy occurs in the Senate the government of the province to which the vacancy relates may, in relation to that vacancy, submit to the Queen's Privy Council for Canada the names of persons who may be summoned to the Senate;
> (2). . .the person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted under Subsection (1). . .;

and:

> 101c. (1) Where a vacancy occurs in the Supreme Court of Canada, the government of each province may, in relation to that vacancy, submit to the Minister of Justice of Canada the names of any of the persons who have been admitted to the bar of that province and are qualified under section 101b for appointment to that court.
> (2) Where an appointment is made to the Supreme Court of Canada, the Governor-General in Council shall, except where the Chief Justice is appointed from among members of the Court, appoint a person whose name has been submitted under Subsection (1). . .;

In regards to the Senate there is no doubt that reform is desparately needed. Indeed the Senate should be reformed to reflect the discrepancies of the Canadian federation; namely giving more representation to those regions whose population precludes them from exercising power in the House of Commons. The fundamental principle which should not be compromised, however, is that the Senate is a federal body, a part of Parliament, and it must remain so. It is inherent in a federal system that the provinces and the national government keep their jurisdictions separate, thus provincial appointments to the Senate violate the principle of co-ordinate government. It may be true that the people of Alberta need increased representation in Ottawa, but the government of Alberta has no right to such representation.

It is moreover very ironic that provincial premiers, who continually decrie the intrusion of the federal government in their areas of jurisdiction (and rightly so it should be stressed) would suddenly leap upon the opportunity to appoint members to a government over which they have no jurisdiction. The premiers have displayed their lack of a cohesive and coherent vision of Canada and of federalism. It is no wonder that in attempting to entrench the Charter of Rights, that Trudeau found them willing 'to trade rights for oil or fish'.

The argument that the changes to the Senate are temporary measures on the way to 'real' Senate reform hold no water. One of the mose prominent reasons for the move toward Senate

reform is that the Senate had lost any political legitimacy it may have once had. Once a body of sobre second thought, it is now a refuge for defeated politicians and retired bagmen--a reward for faithful service to the governing party. Giving such patronage powers to the provincial governments will in no way help the cause of Senate reform; those provinces lobbying for reform will be less likely to quickly give up this new-found and inexpensive (for them) patronage plum, and for those reluctant to reform the Senate there is even less incentive then there was before.

If this were not enough, the first ministers compounded the problem of reforming the Senate, an issue that can only be seen as needing very serious constitutional consideration, by insisting that any new Senate proposal must be agreed upon unanimously by all eleven governments. While the task is not impossible, surely common sense tells one that getting seven provinces to agree is easier than getting all ten to do so.

In a move that must mystify political observers across the country, it was, in fact, Alberta Premier Don Getty that lead the move for this change, the man who will talk about his beloved (but as yet unclarified) 'Triple E Senate' with little or no provocation. Operating on the principle that that all provinces must have an equal voice (in itself a noble sentiment) Getty has managed to strait-jacket Senate reform with an amending formula that is surely the most rigid in any federal system.

It is also rather odd that in moving the motion on the

Accord in the Alberta Legislature Premier Getty took time to thank Dr. Peter Meekison for the advisory role he played in the constitutional negotiations. Meekison is, in Getty's words, "one of the outstanding constitutional minds in Canada". (Alberta Hansard, June 17, 1987) Dr. Meekison was, at the time of the constitutional agreement of 1982, Deputy Minister of Federal and Intergovernmental Affairs for Alberta and one of Premier Lougheed's most senior advisors on the constitution. Meekison is also the author of the 'seven provinces-50%' amending formula. Minutes after thanking Dr. Meekison for his advice, Premier Getty turned his attention to that very formula and said:

> **It's always been my belief that that is not the way to build a country, to take seven provinces and 50 percent of the population and somehow try and jam down the throats of the other 50 percent something you want.**
> (Alberta Hansard, June 17, 1987)

In his critique of the seven-province formula Getty displays a shocking lack of understanding of the nature of federalism. While constitutions in federal systems are usually very comprehensive in the division of powers between federal and constituent governments, they can not cover all the bases and mistakes are sometimes made. In fact, Canada has amended its constitution in the past (or, more correctly, had Britain amend it) in order to make changes to the division of powers. The best example is the unemployment insurance amendment, transfering that particular power to the federal government to allow for a

national program. Changing the division of powers, or any other amendment to the constitution, is usually done through a formula that is itself entrenched in the constitution, though in Canada's case the original British North America Act, 1867 had no such formula. Such amending formula's should be neither too rigid to preclude any changes, nor too flexible to not make the process difficult enough to discourage amending the document on a political whim. Only issues of fundamental importance to the very nature of the country's political system and values should be bound by unanimity clauses. In 1982 it was decided that Canada's status as a constitutional monarchy, its bilingual character, a guaranteed minimum number of seats in the House, and the Supreme Court's composition were so fundamental as to require unanimity to change.

As it now stands, seven provinces having 50 percent of the population could radically alter the composition of the House of Commons (subject to the guarantee above), including the introduction of proportional representation by political party, but the Senate, a legislative body that has become a national joke, is so fundamental to Canada's being in its present form that it requires unanimity to reform. Something is sadly wrong.

The next amendment to be looked at is that concerning the appointments to the Supreme Court of Canada. Since 1982 and the introduction of the Charter of Rights, the Supreme Court has taken on increased significance in Canada's national

life; a significance that will only increase as time goes by. Obviously, given the role the Court has assumed under the Charter a process must be derived that removes from the government the temptation to 'stack' the Court in its favour. Those that feared the Charter would 'Americanize' the Canadian judiciary had a valid point when the topic switched to the appointment of Supreme Court Justices. The Court has a political role to play whether it likes it or not, but steps must be taken to insure that it can perform its role with a minimum level of political interference. The Meech Lake Accord merely switches the temptation to interfere with the Court from the federal to the provincial governments.

It must be emphasized that the Supreme Court is a national body, neither to be directly linked with the federal government nor with a provincial government. This principle must be maintained it the Court is to continue to be seen as the legitimate arbitrator between the levels of government and between the people and the governments. The only thing the Justices should be seen as representing is the law, not the federal government that used to appoint them and not the provincial government that will in the future. Yet in the future there will be (and how can there not be?), at the very least, the perception that Justice X is, for example, Alberta's voice on the Supreme Court and that he/she is meant to look after Alberta's interests. This problem is especially acute with the case of Quebec, which because of the existence of French civil law in that province is

guaranteed three justices on the Court. Should a separatist government ever again come to power in Quebec, the prospect of that agenda becoming the agenda of the Supreme Court is very disturbing.

As with the amendments concerning the Senate, those relating to the Supreme Court are not criticized with the intention of saying that the status quo was acceptable. In both instances it is clearly not the case. However, it is the nature of the proposed solutions that is wrong, both from the prospective of federalism and that of political common sense.

Notwithstanding the criticisms levelled above, the Meech Lake Accord is not without its few favourable elements. As was stated before, a major anomaly in Canadian federalism has been the federal spending power, whereby the national government can spend money in areas designated to be of provincial legislative competence. Such power is justified under the claim that in certain areas (eg. post-secondary education, social welfare and health care) there is a need for minimum levels of availability and service to be upheld regardless of a provinces financial ability to provide. At the same time, the jurisdiction of the provincial government must be respected and under the Meech Lake Accord the ability of the federal government to impose such programs is limited. Consequently, nationally funded programs in areas of provincial competence are to be arranged through negotiation, as they should be in a federal system. Even the provisions to opt

out of such national programs granted to each province make it clear that if that province wishes to receive its portion of the federal funds ear-marked for that program, then the province must meet the national objectives set by the federal government. In the end it would appear that a successful series of negotiations can still allow for such proposed programs as a national day-care plan, and does not have to jeopardize our national health care program. In fact, this amendment would give the federal government the constitutional power to do what the Trudeau government already did with the National Health Act, namely to withhold funds to those provinces that refused to conform to the national objectives of the health care program (i.e. the elimination of extra-billing).

Finally, the entrenchment of regular meetings of the First Ministers on both constitutional and economic issues will serve to give these negotiations an air of legitimacy that they previously lacked. If it is true that negotiation is the heart of the process of federalism, then it is only reasonable to expect there to be a formal forum in which those negotiations are expected to take place.

In the end, the Meech Lake Accord can only be described as a very large black cloud with but the faintest hint of a silver lining. There is nothing necessarily wrong with the concept of Quebec as a 'distinct society within Canada', but the fact that these sections constitute a major change in Canada's political direction, they must be studied far more carefully than they have been up to now. Canada has not

seriously debated this conception of Quebec since Robert Stanfield enunciated the policy of "deux nations" over fifteen years ago. Canada must have the opportunity to look at this proposal again. The provincial power grab illustrated by the Senate and Supreme Court amendments clearly demonstrate the need for a strong federal government with a coherert conception of how federalism should work in Canada. The only area in which the provinces out-manoeuvred themselves was on the change to the amending formula, though it might not be stretching the truth to say some provinces are not too upset in their having hampered the cause of Senate reform.

It can only be hoped that the next meetings of First Ministers are able to rise above the limitations they have imposed with the Meech Lake agreement. Alberta will have to change 'Triple E' from a political mantra to a concrete proposal that answers its many critics if any progress is to be made on the Senate. If the Supreme Court is going to handle the 'distinct society' clause with the wisdom and delicacy needed, then a way must be found to remove the Court from partisan politics as soon as possible. The only thing truly guaranteed in the Meech Lake Accord is that there will be more meetings, perhaps those responsible will be able to correct their own mistakes.

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